LOOP AND TRANSPORT CLEC COALITION
TRO REMAND PRESENTATION

Birch Telecom, Inc.
Broadview Telecom, Inc.
Eschelon Telecom, Inc.
Grande Communications, Inc.
KMC Telecom Holdings, Inc.
NuVox Communications
SNiPLink, LLC
TalkAmerica, Inc.
Xspedius Communications, LLC
XO Communications, Inc.

October 15, 2004

IN THIS PROCEEDING, THE FCC SHOULD ACT TO ENSURE:

- That the new "business class dialtone"-DS1 loops and DS1 EELs-will be made available nationwide as UNEs
- That DS3 and dark fiber transport will be available nationwide, either through multiple competitive supply, or lacking that, through network elements, so that carriers may serve their customers
- That loop/transport combinations and routine network modifications will be available on a nondiscriminatory basis, whether the customer selects a CLEC or an ILEC as its service provider
- That the Section 271 bargain will be fulfilled and 271 checklist items will be unbundled at reasonable, cost-based rates, regardless of the impairment determination under section 251
- That business customers will not lose access to DS1 capabilities from their provider of choice, regardless of network technology that an ILEC chooses to deploy

THE RBOC UNE "FACT" REPORT IS TRULY "FICTION"- "*GARBAGE IN, GARBAGE OUT*"

- Huber claims that CLECs provide 88 million VGEs (*Huber Report*, p. I-9) while official FCC statistics put CLEC non-resale lines at 25 million VGEs, of which only 6.9 million VGEs are over CLEC-owned facilities (*Local Telephone Competition*, Status as of December 31, 2003, WCB June 2004)
- Huber claims that XO has 19.8 million VGEs, whereas XO reported 1.1million VGEs on its form 477
- Huber claims that Allegiance has 1.4 million VGEs, whereas Allegiance reported .5 million VGEs on its Form 477
- Huber claims that Xspedius has 3.4 million VGEs, whereas Xspedius reported 1.7 million VGEs on its Form 477
- Huber claims that KMC has 6.7 million VGEs, whereas KMC reported .3 million VGEs on its Form 477
- All of this leads Huber to the ridiculous conclusion that CLECs are "providing *more* high capacity lines to end users over their own facilities than the BOCs" [*Huber Report*, p. I -9]

ENTERPRISE LOOPS

- *USTA II* did not vacate the Commission's nationwide impairment finding for DS1 loops

- The nationwide finding of impairment for DS1, DS3 and dark fiber loops must be reaffirmed

THE FACTS HAVE NOT CHANGED SINCE THE FCC FOUND NATIONWIDE IMPAIRMENT FOR ENTERPRISE LOOPS 14 MONTHS AGO

- KMC will not build laterals unless a customer purchases at least 3 DS3s [*Duke Declaration,* ¶ 8 & 10]
- XO will not construct laterals unless combined customer demand in a building reaches at least 3 DS3s [*Tirado Declaration*, ¶ 20]
- Xspedius requires a bare minimum of 3 DS3s in customer demand before constructing laterals [*Falvey Declaration,* ¶ 22 & 23]
- For buildings located over 500 feet from its fiber ring, ATI requires that a customer order OC-3 service before building [*Wigger Declaration,* ¶ 23 & 24]
- Eschelon and SNiPLink report that it is never economic to self deploy loops to their bases of DS1 service customers [*Kunde Declaration,* ¶ 14 & 17, *Abate Declaration,* ¶ 5, 7 &9]

THE EVIDENCE IN STATE TRO PROCEEDINGS CONFIRMS THAT ENTERPRISE LOOPS ARE IMPAIRED

- The *QSI Analysis* demonstrates that in 14 large states with fully developed records:
  - Only 36 buildings satisfied the wholesale service trigger for DS1 loops
  - For DS3 loops, only 4 buildings met the wholesale trigger, and 130 buildings satisfied the self-provisioning trigger
  - No building met the self-provisioning trigger for dark fiber loops

[*QSI Analysis*, ¶ 2-3 & 10-14]

THE RBOCs ADMIT THAT CLECs HAVE BUILT FIBER INTO RELATIVELY FEW BUILDINGS

- The *Huber Report* states the CLECs serve fewer than 32,000 buildings with their own fiber. The data is flawed because it is not adjusted to reflect when multiple CLECs serve a single building. But even accepting the aggregate number the total is less than 5% of the nation's commercial office buildings. [*Huber Report*, p. III-4 (Oct. 2004) & *TRO* fn. 856]
- By contrast, the *Huber Report* finds that CLECs require ILEC loop facilities to reach 210,000 buildings "indirectly" [*Huber Report*, p. III-3]

THE RBOCs CONFESS THAT THERE IS VIRTUALLY NO WHOLESALE ALTERNATIVE FOR BUILDING ACCESS

According to the *Huber Report*, fiber wholesalers connect to only approximately 3,000 buildings nationwide, far less than 1% of commercial office buildings [*Huber Report*, p. III-5 (Oct. 2004)]

FCC STATISTICS CONFIRM THAT UNEs REMAIN THE PREDOMINANT MEANS USED BY CLECs FOR "LAST MILE" ACCESS

CLEC-owned facilities are used 23% of the time to connect to customers. By contrast, CLECs rely on UNEs for access to customers 61% of the time [*Local Telephone Competition*, Status as of Dec. 31, 2003, Table 3 and Chart 3 (WCB June 2004)]

DE MINIMUS COMPETITIVE MARKET ENTRY DOES NOT FORECLOSE A NATIONWIDE IMPAIRMENT FINDING

- *USTA I* questioned market-wide impairment findings only where the element in question is "significantly deployed on a competitive basis" even if not "ubiquitous"
- A nationwide finding of impairment for DSO loops has been allowed to stand
- *USTA II* did not even criticize the nationwide finding of impairment for high capacity loops, despite the fact that it was clear in the record that competitive loops were available in rare instances
- *USTA II* acknowledged the "inevitability of *some* over- and under- inclusiveness" in the Commission's unbundling rules, and that the Commission can proceed by "broad national categories" where:
  - (i) there is the evidence indicates that markets do not "vary decisively (by reference to its impairment criteria)"; OR
  - (ii) it explores the "possibility of more nuanced alternatives and reasonably reject[s] them"; OR
  - (iii) provided that the nationwide rule is rational, an otherwise impermissibly broad rule can be cured by a "safety valve" waiver or exception procedure
- *USTA II* makes clear that the Commission is free to "take into account such factors as administrability", presumably such as the canvassing of millions of individual commercial buildings
- Conclusion: If the costs to the Commission and affected parties of a granular inquiry exceed the benefit of "getting it right" in all cases, then the Commission may balance the competing factors in favor of a nationwide impairment finding

INTEROFFICE TRANSPORT

- CLECs always are impaired without access to unbundled DS1 transport
- CLECs are impaired without access to unbundled DS3 and dark fiber transport unless their aggregate traffic on a route exceeds @12 DS3s of traffic, *or* there are multiple competitive suppliers of transport available on a particular route

THE FACTS THAT LED THE COMMISSION TO CONCLUDE THAT CLECs ARE IMPAIRED NATIONWIDE WITHOUT UNBUNDLED TRANSPORT HAVE NOT CHANGED

- ATI will not consider fiber construction on any route until it accumulates at least 15 DS-3s of traffic on a particular route [*Wigger Declaration*, ¶ 36]
- SNiPLink has found that it is uneconomic to deploy its own transport until it accumulates an OC-12 of traffic [*Abate Declaration,* ¶ 10]
- XO reports that transport facility construction is uneconomic unless it has 9-12 DS3s of traffic on a route [*Tirado Declaration*, ¶ 35]
- Broadview reports that capacity requirements must exceed 3 DS3s to justify deployment of fiber to a collocation cage [*Sommi Declaration*, ¶ 6]
- Eschelon reports that it cannot build transport facilities because existing public conduits and rights-of-way are unavailable [*Kunde Declaration*, ¶ 11]

CLECs USUALLY ARE UNABLE TO PURCHASE TRANSPORT FROM OTHER CLECs

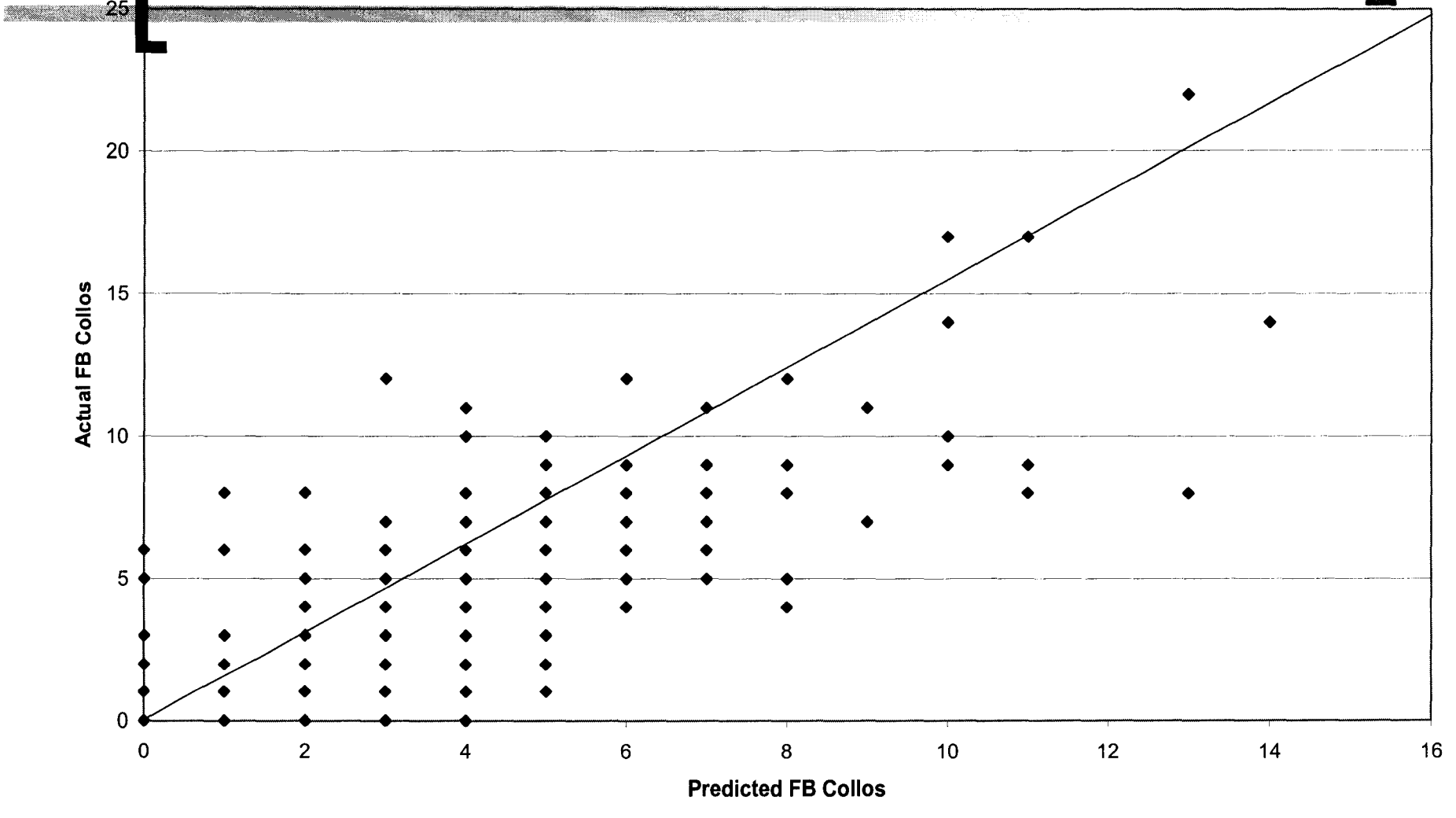
- ATI determined that an alternative DS3 transport provider exists on only 20% of the interoffice routes they need, and multiple competitive DS3 transport providers exist on only 5-10% of routes they use [*Wigger Declaration*, ¶ 45]
- Eschelon lacks any non-ILEC transport option to half of their collocations and multiple competitive providers are available on less than 20% of routes [*Kunde Declaration*, ¶ 6 & 9]
- Non-ILEC transport providers are available on only 25% of Broadview's routes [Sommi Declaration, ¶ 4]
- SNiPLink reports that competitive transport providers exist on only a few routes in the nation's fourth largest MSA [*Abate Declaration*, ¶ 18 & 19]
- Talk America has found that multiple carriers offer DS3 competitive transport on only 35% of its routes, and DS1 transport is never available from competitive suppliers [*Brasselle Declaration*, ¶ 9 & 10]

LINE DENSITY SHOULD NOT BE USED EXCLUSIVELY TO CREATE A TRIGGER TEST

BellSouth's data demonstrates that:

- Many wire centers with 5,000 or more business lines have few or no collocators
  - 50% of such wire centers have no more than one fiber based collocator
- Line density predicts only 59% of variance in the number of collocators
  - Results comparing predicted to actual number of fiber based collocators is shown in the next page
  - Use of line density alone causes an unacceptable incidence of false positives
- The same collocators must be at each end of a route for there to be any meaningful chance of competition
  - Even when there are collocators at both ends of a route, probability analysis shows that the likelihood that a single provider is collocated at both ends of a route is less than 50 percent

Predicted vs. Actual FB Collos
Simple regression using Total Business Lines



THE RBOCs CONCEDE THAT A SINGLE CLEC MUST BE COLLOCATED ON BOTH ENDS OF A ROUTE TO HAVE POTENTIAL TRANSPORT COMPETITION

- "[F]iber–based collocation provides a straightforward…indication of which wire centers are served by competitive fiber. When a single CLEC collocates in two or more wire centers, it is reasonable to assume that competitive transport is available between or among those specific locations." [*Huber Report*, p. III-29 (Oct.2004)].

THE RBOCs CONCEDE THAT FIBER-BASED COLLOCATION IS A REALITY IN RELATIVELY FEW WIRE CENTERS

"[O]ne or more competing carriers have obtained fiber-based collocation in approximately 16 percent of the approximately 9,900 wire centers served by the small Bell companies." Indeed, approximately half of the BOC wire centers with more than 5,000 business lines lack any collocator [*Huber Report*, p. III-7 & III-28 (Oct. 2004)]

THE RBOCs ADMIT THAT MULTIPLE FIBER-BASED COLLOCATORS IN A SINGLE OFFICE IS RARE

- The *Huber Report* data shows that approximately 9 percent of BOC wire centers have 2 or more collocators, 6 percent have 3 or more collocators, 4 percent have 4 or more collocators and 3 percent have 5 or more collocators. [Compare *Huber Report* Tables 4&10]

- BellSouth data shows that 95% of its wire centers with 25,000 of fewer business lines have 3 or fewer collocators

RECOMMENDED TESTS FOR DETERMINING WHETHER ADEQUATE COMPETITIVE SUPPLY EXISTS ON A PARTICULAR ROUTE

Tier One: Non-Impairment where:

- Top 50 MSAs; and
- Routes with wire centers serving 50,000 business lines on both ends; and
- At least 4 fiber-based collocators

Tier two: Impairment where:

- All routes with a wire center on either end serving fewer than 25,000 business lines

Tier three: For all other routes, impairment exists unless:

- At least 5 fiber based collocators with active collocations at both ends of the route; and
- At least 2 such collocators self certify that they provide wholesale transport service on the route

THE RBOCs ALREADY HAVE COMPILED THE DATA NECESSARY TO ADMINISTER THE FIBER-BASED COLLOCATOR TEST

"Fiber-based collocation provides a straightforward and reliable indicator of the presence of competitive fiber. The Bell companies have compiled reliable data on where CLECs have obtained fiber-based collocations by performing physical inspections of thousands of central offices, and from reviewing billing records where CLECs have ordered such collocations." [*Huber Report*, p. III-6 (Oct. 2004)]

A WHOLESALE TRIGGER IS SIMPLE TO ADMINISTER

- Minor additions to annual CLEC Form 477 reporting requirement
- CLECs with wholesale products are motivated by self-interest to report routes with competitive supply

SPECIAL ACCESS IS NOT AN ECONOMIC ALTERNATIVE FOR WIRELINE CLECs

- Special access is priced well above UNE rates
  - Month-to-month rates should be used for an apples-to-apples comparison
  - Even with discounts, special access rates are much higher than UNEs
  - Special access rates as a whole generate enormous profits for the RBOCs, thereby proving they retain significant market power
  - If UNEs were eliminated, the RBOCs would increase special access rates above current levels
- Use of special access by some CLECs/IXCs is not proof that UNEs can be eliminated
- Robust competition in the wireless market, where carriers rely on special access, proves nothing about the risk to CLECs if they were forced to rely on special access

THE REALITY OF OVERPRICED SPECIAL ACCESS SERVICES

Carrier	Special Access Pricing Premium Over UNE Rates	Source
ATI	200-1,000% For DS1 loops	*Wigger Declaration,* ¶ 50 & attachment I
Broadview	225% for all loops and transport combined; mileage element of transport increases up to 900%	*Sommi Declaration,* ¶ 14
Talk America	6,000-13,000%premium for DS1 and DS3 transport	*Brasselle Declaration,* ¶ 12
XO	20-606% depending on facility and location	*Tirado Declaration* attachment 13
Eschelon	Special access rates exceed rates available competitive suppliers by 58-100%	*Kunde Declaration* attachment 1
Nationwide	In 2003, RBOCs earned supra normal returns 43.7% on special access	*Mayo/ Micra/ Bates/ White Analysis,* ¶ 112

CLECs CANNOT ABSORB A SPECIAL ACCESS RATE SHOCK

- The cost of loops constitute 54-93% of direct costs incurred by CLECs in providing DS1 services [*Tirado Declaration*, ¶ 43
- For a typical $1,000 per month business customer of wireline CLEC DS1 service, the UNE loop and transport cost would leap from $200 per month to $550 per month if special access were substituted for UNEs [*Mayo/ Micra/ Bates/ White Analysis*, ¶ 107]

CLECs DEPEND UPON THE AVAILABILITY OF UNEs

- XO purchases only 25% of DS1 loops and 23% of DS3 circuits as special access [*Tirado Declaration*, ¶ 44]
- Except where special access is priced at the UNE rate, Xspedius purchases only 23% of DS1 circuits as special access[*Falvey Declaration*, ¶ 36]
- KMC orders only 6% of facilities from SWBT as special access, and 8% of facilities from BellSouth as special access.
- ATI orders 95% of DS1 circuits as UNEs [*Wigger Declaration*, ¶ 52]

USE OF SPECIAL ACCESS BY ISOLATED CLECs IS NOT EVIDENCE OF NON-IMPAIRMENT

- Time Warner Telecom reports that its reliance on special access:

  - Is preventing it from constructing it's own facilities

  - Has only proven economically feasible because the existence of cost-based UNE pricing is provided leverage to negotiate volume and term discounts

  -May no longer be available, since RBOCs have raised special access rates since the release of the USTA II decision [*Time Warner Telecom Comments*, pp. 13 & 18]

- Carriers that are serving large enterprise customers use special access because of problems with "qualifying" their services for use of UNEs

- These carriers have been protected against price squeezes until recently when the 271 restrictions on the RBOCs were removed

RELIANCE ON SPECIAL ACCESS BY CMRS CARRIERS IS NOT COMPARABLE TO USE OF SPECIAL ACCESS BY WIRELINE CLECS

- CMRS carriers provide their own wireless loops
- ILEC facilities represent a tiny share of the CMRS carriers' cost of service
- ILEC CMRS affiliates compete out-of-region, reducing the incentive to discriminate
- CMRS providers have much stronger balance sheets/income statements than wireline CLECs
- Operating margins for CMRS exceed those for wireline local exchange services
- Demand for wireless services is growing far faster than demand for wireline local services